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Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1107 86

AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

versus

OOLITE CONCRETE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE
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No. 1107.

AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

versus

OOLITE CONCRETE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PRELIMINARY STATEMENT.

Respondent opposes the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 2, 1965, which affirmed a damage judgment rendered in the action brought by Respondent under § 303 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 187.

Pursuant to Rule 40, paragraph 3, of the Rules of this Honorable Court, Respondent adopts as correct the statements contained in the Petition with respect to the Opinion below (petition p. 2) and Statute involved (petition p. 3).

JURISDICTION.

The Supreme Court of the United States has jurisdiction to review this decision entered herein by the United States Court of Appeals for the Fifth Circuit, but Respondent respectfully submits that in the exercise of sound judicial discretion the Honorable Court will deny review since the decision of the United States Court of Appeals for the Fifth Circuit does not conflict with the decision of any other United States Courts of Appeal, does not decide issues not already decided by this Honorable Court, and is not in conflict with any decisions of this Honorable Court.

QUESTIONS PRESENTED.

1.

Whether or not sound judicial discretion will allow a writ of certiorari herein when the decision of the court below does not decide any issue not already decided by the Supreme Court of the United States, does not conflict with any decisions of the Supreme Court of the United States, and does not conflict with the decisions of any other United States Courts of Appeal?

2.

Whether or not the National Labor Relations Board has primary jurisdiction of an action brought in the United States District Court under the provisions of § 303 of the Labor Management Relations Act?

3.

Whether or not a *per se* doctrine is determinative of the legality, under § 303 of the Labor Management Relations Act, of a Union's ambulatory picketing of an employer?

STATEMENT OF THE CASE.

Respondent, Oolite Concrete Company, a supplier of ready-mixed concrete, was engaged in supplying concrete to various contractors and construction projects in the Miami, Florida, area during the summer of 1962 (R.14). Respondent operated three ready-mixed concrete plants, one in South Dade County, one in North Dade County, and one at S. W. 71st Avenue in Miami, referred to in the record as Bird Road Plant (R.14). The events out of which this action arose involved the employees of the Bird Road Plant and the North Dade Plant; Respondent employed from 16 to 18 ready-mix concrete truck drivers at the Bird Road Plant and from 12 to 14 at the North Dade Plant (R.15).

On the morning of June 7, 1962, at approximately 8 a.m., (R.29) pickets appeared at Respondent's Bird Road Plant (R.15). They carried signs reading "Oolite Concrete

Company drivers receive substandard wages and working conditions. Teamsters Local Union 290" (R.153).

The pickets remained at the plant site 20 to 30 minutes and followed trucks to several construction projects which were being supplied by Respondent, Oolite, with ready-mixed concrete (R.15). These included the construction by John A. Volpe Construction Company of a "Federal Building" in Miami (R.71, 131); Prahl Brothers Construction Company of a Howard Johnson's Restaurant (R.52); and Millman Construction Company of a Zayre's Department Store (R.60).

At the Volpe project, the job was surrounded by a high board fence with gates on each of the three streets providing access to the site (R.17). At this job, the trucks would wait across the street from the job on a parking apron until they were signaled to come on to the construction site for discharge of their concrete (R.81-82). The concrete was discharged inside the high board fence (R. 82-83). After the picketing commenced, the workmen at the Federal Building project refused to handle the concrete. This resulted in a temporary stop in the work on the building.

On the morning of June 8, 1962, pickets again appeared at the Federal Building job and pouring was stopped since the Laborers' Union refused to handle the concrete and the iron workers walked off the job. Other crafts or trades did not walk off the job but engaged in a sit-down (R.68). The pickets did not attempt to enter the job in

order to picket the trucks (R.90). Volpe, after giving Oolite "a day or two to try to get themselves straightened out", on June 13, 1962, forced Oolite to fulfill its contract through another supplier. Arrangements were made by Oolite for Acme Concrete Company to deliver the concrete to fulfill Oolite's contract (R.68-69).

The Prahl construction project was of a Howard Johnson's restaurant; picketing was carried on twice (R.30, 53). This job site was also unusual in that pickets could not be seen from where the trucks discharged their loads (R.31). At this project upon appearance of pickets, the workmen, including the iron workers, carpenters, and electricians, walked off the job (R.51, 53). At the time of the second picketing, all workmen except the laborers and cement finishers stopped work. These employees continued to work since they were engaged in the process of pouring floors (R.53). After these two work stoppages, Mr. Prahl advised Oolite "to get the trucks off the job" (R.54). Oolite made arrangements with Maule Industries, Inc., another supplier of concrete, to deliver its contract commitments to the Howard Johnson construction site (R.54).

Similarly, at the Millman project, the Zayre Department Store construction site, picketing was carried on twice (R.60). On the first day pickets appeared as Oolite trucks appeared at the job site. The iron workers and carpenters sat down and refused to work during the unloading of two of four Oolite trucks. The construction superintendent turned the other two trucks away, thereby preventing de-

livery by Oolite (R.61). After a lapse of one day, four more loads of concrete were ordered for the Millman project. Again, the picketing commenced, the employees sat down and refused to work and two trucks were turned away (R.62). Arrangements were then made with Maule to deliver the remainder of the concrete under Oolite's commitment (R.62-63). The pickets did not request to come on the job site to picket the trucks (R.63).

At several other job sites, picketing was carried on only once. These included the projects at Golden Glades Interchange, Starr Charm Homes, and May Gold Homes. At none of these projects was there any work stoppage (R.33, 131). At another project, the Cochran Filling Station job (at which there were only two workmen), no picketing was carried on, even though the Union president, who had engaged in the picketing at other job sites, and other pickets drove past the site slowly during the pouring when two of Respondent's trucks were present or appeared (R.84-85). They did not stop and picket their trucks.

The Union's asserted purpose in picketing was to let Oolite employees "know that they are getting substandard wages in general" (R.143). Picketing at Respondent's plants was only sporadic and limited to twenty minutes or half an hour and was admittedly for the primary purpose of observing trucks as they left the plant in order to follow them to job sites where picketing could be carried on (R.120). Although starting time for the drivers was 7 a.m., pickets were never observed at the plant prior to 8 a.m. (R.26, 30). The Union through its officers or through the

pickets made no efforts to prevent work stoppages which it contended were the unintended results of the picketing.

Oolite filed a petition for an election with the National Labor Relations Board and filed an unfair labor practice charge alleging violation of § 8(b)(4)(ii) of the Labor Management Relations Act. Picketing ceased and an election was held in which the drivers voted not to be represented by the Teamsters Union.[1] The charges filed with the National Labor Relations Board which alleged that the Union was engaging in violation of the secondary boycott proscription of the Act was an effort to have the Regional Director seek an injunction under the provisions of the Act. The Regional Director did not proceed as authorized and the charge was dismissed.

The jury rendered a verdict in favor of Oolite in the amount of $3,136.00 for damages. The Fifth Circuit Court of Appeals affirmed the verdict and held that there was evidence from which the jury could infer unlawful conduct as alleged, and that there was no error in the trial court's failure to submit defendant Union's requested charge to the jury, since it was "entirely too broad" and "was not an accurate statement of the law".

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[1] The charge was filed on June 19, 1962 (R.114), and according to the Union, the picketing ceased on June 20. The election was held in the latter part of July.

REASONS FOR REFUSING TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

POINT ONE.

THERE IS NO *PER SE* RULE FOR DETERMINING LEGALITY OF PICKETING WHICH INDUCES SECONDARY EMPLOYEES TO RESPECT A PICKET LINE; THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS OF APPEAL AND IS SUPPORTED BY THE EVIDENCE.

The Petition advances, as a reason for granting the Writ, the fact that the Fifth Circuit Court of Appeals has misapplied the statute and "deprived workers of the right of primary picketing". This case is characterized as another in a line of cases in which the court below has purportedly disregarded cases decided by this Court, specifically, *Local 761 v. N.L.R.B.* (General Electric), 366 U.S. 667 (1961), and *United Steelworkers v. N.L.R.B.* (Carrier), 376 U.S. 492 (1964).

The attack upon the Fifth Circuit Court of Appeals[2] has no basis. The cases relied upon are clearly distinguishable and involve different considerations in applying the statute. The *General Electric* and *Carrier* cases considered the application of § 8(b)(4) of the Act in an unfair labor practice proceeding. The *General Electric* case involved

[2] Note that in the case of *Superior Derrick Corp. v. N.L.R.B.*, 273 F.2d 891 (5th Cir. 1960), so severely criticized by Petitioner certiorari was denied. 364 U.S. 816 (1960).

a Union's right to picket a "separate gate" at a struck employer's plant site. The separate gate was reserved for independent contractors' employees performing work at the struck plant. *Carrier* involved the Union's right to picket a railroad right of way (asserted to be a separate gate) used to make deliveries to the plant. The entrance was held to be so "proximate and related to employer's day to day operations" as to be a gate of Carrier. The distinction between these cases and the instant case is not subtle but very real and obvious. The picketing involved in this case was picketing of construction job sites at which Oolite (the employer) made truck deliveries of ready-mixed concrete. The specific problem in *General Electric* was whether the Dry Dock criteria (developed in a "common situs" situation) could be applied to picketing at the "primary site"! The construction sites were secondary sites (rather than primary) to which Oolite made deliveries.

Petitioner is not only erroneous in its assertion that the court misapplied the statute, but contrary to this Court's reasoning, Petitioner urges a *per se* rule for determining legality of picketing.

In the *General Electric* case, this Court observed:

> As is too often the way of law or, at least of adjudications, the Dry Dock tests were mechanically applied so that a violation of one of the standards was taken to be presumptive of illegal activity.

Petitioner seeks to have this Court rule that if a Union's picketing conforms to the Dry Dock standards it is *per se*

legal and an unlawful motive would be irrelevant.[3] This Court did not approve the mechanical application of the tests, and the N.L.R.B. has expressly denounced a *per se* application of the tests. In *Plauche Electric, Inc.*, 135 N.L.R.B. 250 (1962), the Board stated:

> These standards (Dry Dock) are not to be applied on an indiscriminate "per se" basis, but are to be regarded merely as aids in determining the underlying question of statutory violation. 135 N.L.R.B. at 255.

Petitioner in urging the *per se* application of the Dry Dock standards states in its brief:

> As this Court has noted the N.L.R.B. 'modified and reformed its standards on the basis of accumulating experience' (citing General Electric) and concluded that *when (as here) the situs of the primary employer was 'ambulatory'* there were four objective standards to be applied in determining whether the challenged picketing was primary and therefore lawful. . . .

Petitioner ignores the fact that the *situs* of the primary employer was not ambulatory since Oolite had three plant sites, and each driver spent considerable time at the plant and entered and left the plant approximately six to twelve times per day. In the *Moore Dry Dock* case the situs of the dispute was a ship and the dry dock or secondary premises was the *only* place where picketing

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[3] One of Petitioner's distinguished law firms argued just as vehemently (and successfully to the Fifth Circuit) that the Dry Dock tests should not be mechanically applied. *N.L.R.B. v. General Drivers, Warehousemen & Helpers, Local 968*, 225 F.2d 205 (5th Cir. 1955).

could take place. Note that a fifth criteria was added to the Dry Dock standards by *Washington Coca Cola Bottling Works, Inc.*, 107 N.L.R.B. 299 enf'd 220 F.2d 380 (D.C. Cir. 1955), namely, where a primary employer had a permanent place of business at which the dispute could be publicized, it was unlawful to picket a "common situs". Later, Appellate Courts refused to follow this rule and the Board abandoned it in *Plauche Electric, Inc., supra.* However, it is important to observe (and Petitioner failed to note) that the Board specifically pointed out it was not holding that the place of picketing was irrelevant in determining the legality of the picketing. The place of picketing and the existence of a permanent place of business which could be picketed is "one circumstance among others in determining the object of the picketing".

The evidence from which the jury did conclude that a purpose of the Teamster picketing was to induce the secondary employees to engage in a concerted refusal to work for the object of forcing John A. Volpe Construction Co., Prahl Brothers Construction Co., and Millman Construction Co. to cease dealing with Oolite has been summarized above.

Admittedly, the picketing at job sites was carried on where the pickets were not within sight of Oolite employees. *Brown Transport Corp. v. N.L.R.B.*, 334 F.2d 30 (5th Cir. 1964). Petitioner made no efforts to follow the trucks on the job site or to seek permission to picket as close to the truck as possible. There is no evidence that Petitioner made any effort to prevent work stoppages which it contended were not the intended result of the

picketing. On the contrary, pickets did not continue picketing job sites where their presence did not cause a walk-out, sit-down, refusal to work, or other interruptions. Pickets were not placed at sites where Oolite was delivering concrete where there were no other employees present to be made target of the picketing. Picketing of the plants was sporadic, for short periods (twenty to thirty minutes) and for the purpose of following a truck to a construction site. Pickets made no effort to be at the plant at the beginning or close of the work day.

These factors justify the jury's finding of the Union's unlawful purpose and demonstrate that the Dry Dock criteria were not in fact met. The verdict based on the Union's violation of the statute, affirmed by the court of appeals, is based on fact and is not contrary to law.

This Court has firmly stated that where there is an evidentiary basis for the jury's verdict, the jury is free to discredit and disbelieve whatever evidence that is inconsistent with its conclusion. *Dennis v. Denver & Rio Grande Western R.R. Co.*, 373 U.S. 208 (1963); *Lavender v. Kurn*, 327 U.S. 645 (1946).

Petitioner seeks to have a redetermination of this case made on its facts; obviously the "facts" which the jury did not believe. In *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959), the court commented on the role of courts in this area:

> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could

have drawn different inferences or conclusions or because judges feel that other results were more reasonable.

As stated above, the record contains abundant evidence to support the jury verdict, as recognized by the court of appeals. The writ requested should not be granted.

POINT TWO.

THIS COURT HAS PREVIOUSLY REJECTED THE ARGUMENT THAT THE LANDRUM-GRIFFIN AMENDMENTS TO § 303(a), 29 U.S.C. § 187(a) REQUIRE RESORT TO N.L.R.B.'S PRIMARY JURISDICTION TO ESTABLISH THE EXISTENCE OF AN UNFAIR LABOR PRACTICE AS A PREREQUISITE TO A DAMAGE SUIT UNDER THE PROVISIONS OF § 303.

Contrary to Petitioner's contention this and the case of *Aircraft, etc., Local 290, I.B.T. v. Schilling*, on application for certiorari No. 1057, October Term, 1964, are not the first cases in which this Court has had an opportunity to determine the effect of the Landrum-Griffin Amendments with respect to § 303 (29 U.S.C. § 187). *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964), involved a suit brought by an employer under § 303 and under the common law of Ohio. In affirming the award of compensatory damages for the violation of § 303, this Court made the following observation:

> Section 303(b) of the Labor-Management Relations Act expressly authorizes state and federal courts to award damages to any person injured by certain

> secondary boycott activities described in § 303(a). The type of conduct to be made the subject of a private damage action was considered by Congress, and § 303(a) comprehensively and with great particularity "described and condemns specific union conduct directed to specific objectives." Carpenters Local 1976 v Labor Board, 357 US 92, 98, 2 L ed 2d 186, 1193, 78 S Ct 1011.

Additionally, in footnote 13 the Court, it is respectfully submitted, disposed of Petitioner's contentions concerning the effect of the Landrum-Griffin Amendments:

> Section 8(b)(4), 29 USC § 158(b)(4), and § 303, 29 USC § 187, "having an identity of language" but specify two "different remedies". Longshoremen v. Juneau Corp. 342 US 237, 244, 96 L ed 275, 281, 72 S Ct 235. Section 8(b)(4) provides that certain conduct constitutes an unfair labor practice for which an administrative remedy is afforded. The same conduct under § 303 *also* gives rise to a claim for damages cognizable in either state or federal courts. *As a consequence of the 1959 amendments to the Act, § 303 now incorporates by reference the prohibitions embodied in § 8(b)(4).* (Emphasis supplied.)

This Court considered at some length the contention here raised by Petitioner in *International Longshoremens' and Warehousemens' Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952), and in rejecting the contention the Court stated:

> The main contention of petitioners in the case is that § 303(a)(4) read in light of § 8(b)(4)(D) renders illegal only such picketing as takes place after and in

face of a determination by the Board that acts complained of were unfair labor practices. . . .

Section 8(b)(4)(D) and § 303(a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; § 303(a)(4) to a judgment for damages; The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other. Certainly there is nothing in the language of § 303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather the opposite seems to be true. . . . (342 U.S. at 243-44.)

N.L.R.B. v. Radio & Television Broadcast Engineers' Union, 364 U.S. 573 (1961), was decided after the Landrum-Griffin Amendments, and in this case this Court adhered to its decision in *Juneau Spruce Corp., supra*, stating:

A second inconsistency is urged with § 303(a)(4) of the Taft-Hartley Act, which authorizes suits for damages suffered because of jurisdictional strikes. The argument here is that since § 303(a)(4) does not permit a union to establish, as a defense to an action for damages under that Section, that it is entitled to the work struck for on the basis of such factors as practice or custom, a similar result is required here in order to preserve "the substantive symmetry" between § 303(a)(4) on the one hand and §§ 8(b)(4)(D) and 10(k) on the other. This argument ignores the fact that this Court has recognized the separate and distinct nature of these two approaches to the problem. . . . (364 U.S. at 584-85.)

Petitioner finds "sparse" legislative history to support its contention. While pertinent legislative history may be sparse, it establishes that this Court's interpretation in *Morton, supra,* is correct. Representative Lafore, in offering an amendment to § 303, which embodied, in essence, the language finally adopted, commented:

> Section 303 of the present Taft-Hartley Act is the section which provides for damages resulting from the unfair labor practices set out in § 8(b)(4). My bill makes no change in the overall idea of § 303. It merely streamlines it and brings it into conformity with the new changes in § 8(b)(4).
>
> The present § 303(a) is eliminated as repetitious and unnecessary. It is covered by reference to avoid repeating all the unfair labor practices set our in § 303(b) of the present law. 105 CONG. REC. 3512, daily ed. March 11, 1959.

In view of this Court's decision in *Juneau Spruce, supra,* had Congress intended to vest primary jurisdiction in the N.L.R.B. in the case of § 303 damage suits, it would have used plain and unambiguous language to accomplish this purpose.

Finally, in support of the rule established by this Court is the fact that decisions of the General Counsel of the N.L.R.B. are not reviewable. *Hourihan v. N.L.R.B.,* 201 F.2d 187 (D.C. Cir. 1952), *cert. denied* 345 U.S. 930 (1953); *Dunn v. Retail Clerks Int'l Assoc.,* 307 F.2d 285 (6th Cir. 1962). To sustain Petitioner's contention would mean that the Respondent would never have its day in court.

Clearly, Congress did not intend, nor did it amend the law so as to make an N.L.R.B. finding, that the conduct of which an employer complains was an unfair labor practice, a prerequisite to such employer maintaining a § 303 damage suit.[4]

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[4] At Page 16 of its petition, Petitioner cites and quotes from an article by Professor Louis L. Jaffe in *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964). In another portion of this article, Professor Jaffe approves the action of Congress and this Court with respect to concurrent jurisdiction by the Courts and the N.L.R.B.:

> The conflicts so glibly supposed to follow from the excesses of parallel and concurrent jurisdiction by courts and agencies have not proved, in the case of the NLRB, sufficiently consequential to justify an exclusion of court jurisdiction. At one time the Supreme Court thought even the remotest possibility of conflict sufficient to oust the jurisdiction of state courts. This point of view on the one hand overstates the likelihood and significance of conflicts and on the other sets up an unreal goal of doctrinal and factual harmony. Moreover, a federal agency's resources of money, time, and men are rarely adequate to its farflung jurisdiction, and this exaggerated application of the doctrine of preemption created a no man's land of cases which the state courts were forbidden to handle and the Board could not. In response, Congress in the Taft-Hartley Act authorized the federal courts to enforce collective bargaining agreements and more recently has qualified preemption in this area by allowing state courts to exercise their traditional jurisdiction when the NLRB declines. . . . The Supreme Court has now wisely decided to allow the exercise of court jurisdiction despite the presence of potential NLRB jurisdiction, at least in the absence of "serious problems" of conflict. It is to be hoped that in the exercise of this jurisdiction it will seldom be necessary to invoke the doctrine of primary jurisdiction. (Footnotes Omitted.)

CONCLUSION.

For the reasons set forth above the writ of certiorari should not be granted.

Respectfully submitted,

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